SEALDECK (KUALA LUMPUR) SDN BHD A

v.

ONN CHOON KOI

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: S3(S4)-22-430-1997]
25 FEBRUARY 2008

LAND LAW: *Tenancy agreement - Misrepresentation - Whether agreement void by reason of s. 24(a) Contracts Act 1950 - Whether unenforceable by parties - National Land Code, s. 127 - Whether defendant to refund deposit to plaintiff - Contracts Act 1950, s. 66 - Whether plaintiff reckless when it failed to do a land office search before carrying out commercial activities on land - Whether allegation of misrepresentation baseless* C

LAND LAW: *Tenancy agreement - Breach of - Whether agreement void by reason of s. 24(a) Contracts Act 1950 - Whether unenforceable by parties - National Land Code, s. 127 - Whether defendant to refund deposit to plaintiff - Contracts Act 1950, s. 66 - Whether plaintiff reckless when it failed to do a land office search before carrying out commercial activities on land* D E

This was an action by the plaintiff against the defendant for misrepresentation and breach of tenancy agreement. There was a counter claim by the defendant against the plaintiff for breach of the same tenancy agreement. The defendant was the registered owner of a piece of land in Sungai Buloh ('the land'.). The defendant entered into a F tenancy agreement with the plaintiff whereby the defendant let out the land to the plaintiff on a three-year tenancy. The rental was RM4,500 per month and in addition the plaintiff had to pay a deposit of RM9,000. The land in question had an express condition stipulating that the land must be used only for village (kampung) purposes and for building one G house for residence. Notwithstanding the above express condition, the plaintiff from the beginning had made it known to the defendant that its sole purpose of taking the tenancy of the land was to erect a store for the purpose of storing its trade stocks. Subsequent to entering the tenancy agreement, the plaintiff erected a single storey building. H However, the plaintiff terminated the tenancy agreement after having been served with an interim injunction order restraining the defendants and their servants and agents from erecting any building on the said land until the disposal of the action in that suit. It was the contention of the plaintiff that there was a misrepresentation on the part of the I defendant when the latter said that there was no condition imposed on the usage of the land in erecting a building on the land for the purposes

of the business of the plaintiff. On the part of the defendant, he alleged that it was the plaintiff who had breached the tenancy agreement by erecting a building on the land without first obtaining the permission of the State Authority. The defendant was also counter-claiming against the plaintiff for non-payment of monthly rentals of RM4,500 from 1 March 1996 until 31 December 1998.

Held (dismissing plaintiff's claim; dismissing defendant's counterclaim; with no order as to costs; deposit of RM9,000 to be refunded to plaintiff):

(1) The tenancy agreement was void by reason of s. 24(a) of the Contracts Act 1950 and thus it was unenforceable by either of the parties. The purpose of the tenancy agreement was to enable the plaintiff to erect a building on the land for business purposes. Thus, the purpose of the tenancy agreement, as envisaged by the parties, was something that was forbidden by the express condition imposed on the title of the land, meaning that the purpose was forbidden by law. It was forbidden by law because it was forbidden by s. 127 of the National Land Code which provides for the sanction for any breach of condition imposed on any alienated land. If there was any breach of condition, the land was liable to forfeiture; alternatively, the proprietor was liable to be fined by the Land Administrator. By reason of s. 66 of the Contracts Act 1950 the defendant must refund to the plaintiff the RM9,000 that had been paid by the plaintiff to the defendant as a deposit under the tenancy agreement. (para 16)

(2) It was no defence for the plaintiff to say that they were not aware of the condition endorsed on the land title. Being ignorant of the law was inexcusable. It was incumbent on the plaintiff to do a land office search before carrying out their commercial activities on the said land. If they had failed to do the search, then, it was recklessness on their part. This court would not condone such recklessness. Further, one of the plaintiff's causes of action against the defendant was that of misrepresentation in that the plaintiff alleged that the defendant, prior to the signing of the tenancy agreement, had told the plaintiff that there was no restriction on usage imposed on the title of the land. The allegation of misrepresentation was baseless as the plaintiff had the means of knowing about the condition imposed on the title of the land by means of a simple land search at the Land Office. (paras 18 & 19)

[Plaintiff's claim dismissed; defendant's counter-claim dismissed; with no order as to costs; deposit of RM9,000 to be refunded to plaintiff.]

Legislation referred to:
Contracts Act 1950, ss. 19(1), (2), 24(a), 66
National Land Code, s. 127(1), (1A), (1B), (1C), (2), (3), (4)

For the plaintiff - V Kumaresan; M/s Huang Khairun Kumar & Assoc
For the defendant - Maurice Scully; M/s Scully & Yoon

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Mohd Yunus J:

[1] This is an action by the plaintiff against the defendant for misrepresentation and breach of a tenancy agreement.

[2] There is a counter-claim by the defendant against the plaintiff for breach of the same tenancy agreement.

[3] The defendant was the registered owner of a piece of land in Sungai Buloh, Selangor. On 23 March 1996 the defendant entered into a tenancy agreement with the plaintiff whereby the defendant let out the land to the plaintiff on a three-year tenancy. Although the tenancy agreement was signed on 23 March 1996, the tenancy, according to the terms of the agreement, was to take effect from 1 January 1996. The date of the termination of the tenancy was 31 December 1998. The rental was RM4,500 per month. In addition, the plaintiff had to pay a deposit of RM9,000. The purpose of the tenancy is stated in the third recital of the tenancy agreement, and it is as follows:

> 3. With the consent of the Landlord, the Tenant shall be allowed to construct a single storey building on the Demised land for the purpose of the Tenant's business.

[4] The tenancy agreement was prepared by the solicitors of the plaintiff, Messrs T.C. Leong & Co.

[5] The land in question has an express condition that states:

> Syarat-syarat Nyata
>
> Tanah yang diberi milik ini hendaklah digunakan semata-mata untuk maksud kampong dan pembinaan sebuah rumah kediaman. Rumah kediaman yang dimaksudkan itu, hendaklah didirikan dalam tempoh (2) tahun dari tarikh pendaftaran Suratan Hakmilik, mengikut jenis dan reka bentuk yang diluluskan oleh Pegawai Daerah, Petaling dan selepas itu hendaklah menjaga bangunan tersebut dengan keadaan baik setara dengan kehendak-kehendak Pihak Berkuasa Negeri atau Pihak Berkuasa Tempatan.

[6] The above express condition stipulates that the land must be used only for village (kampong) purposes and for building one house for residence. Thus, the land cannot be used to erect a building for business purposes.

[7] Notwithstanding the above express condition, the plaintiff from the beginning had made it known to the defendant that its sole purpose of taking the tenancy of the land was to erect a store for the purpose of storing its trade stocks.

[8] Subsequent to entering the tenancy agreement, the plaintiff erected a single storey building at a cost of RM410,872.50.

[9] However, at a later date, the plaintiff terminated the tenancy agreement on 3 April 1997. The plaintiff did so by its solicitors' letter dated 9 May 1997. The plaintiff terminated the tenancy after having been served with an interim injunction order dated 5 November 1996 issued by the High Court of Kuala Lumpur (Civil Division) *via* suit No: S3-22-73-1996 ('the 1996 suit'). In this writ action, the plaintiff was one Dr. Ong Kim Chong Realty Sdn Bhd and the defendants were the defendant in the present action and one Toh Ah Fatt. The interim injunction order restrained the defendant and their servants and agents from erecting any building on the said land until the disposal of the action in that suit.

[10] In the 1996 suit the plaintiff therein claimed, *inter alia*, for specific performance of an 'option agreement'. It is alleged that under this option agreement the defendant and another person by the name of Toh Ah Fatt had agreed to sell the land to the plaintiff in that action (that is, Dr. Ong Kim Chong Realty Sdn Bhd) but subsequently failed to proceed with the sale transaction. The defendant in the present case denies signing the option agreement. In any event the 1996 suit had been discontinued after the parties therein had reached an amicable settlement.

[11] Now, reverting to the present case, it is the contention of the plaintiff that there was a misrepresentation on the part of the defendant when the latter said that there was no condition imposed on the usage of the land in erecting a building on the land for the purposes of the business of the plaintiff.

[12] It is also the contention of the plaintiff that the defendant did not disclose to the plaintiff that the defendant had in fact sold the land to a third party. This, according to the plaintiff, had prejudiced their interest because the third party had subsequently obtained a restraining order from the Kuala Lumpur High Court. The plaintiff further contends that had it been made known of the purported sale to a third party it would not have taken up the tenancy.

[13] On the part of the defendant, he alleges that it was the plaintiff who had breached the tenancy agreement by erecting a building on the land without first obtaining the permission of the State Authority. The defendant is also counter-claiming against the plaintiff for non-payment of monthly rentals of RM4,500 from 1 March 1996 until 31 December 1998.

[14] At the conclusion of the trial, I dismissed both the plaintiff's claim and the defendant's counter-claim; both with no order as to costs. But I ordered the defendant to refund the deposit of RM9,000 to the plaintiff.

[15] In my judgment, the tenancy agreement is void by reason of s. 24(a) of the Contracts Act 1950 and thus it is unenforceable by either of the parties. Section 24(a) states:

> **24. What considerations and objects are lawful, and what not**
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> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law.
>
> (b) …
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[16] In the present case, the purpose of the tenancy agreement, as evidenced by recital 3 of the tenancy agreement, was to enable the plaintiff to erect a building on the land for business purposes. Thus, the purpose of the tenancy agreement, as envisaged by the parties, is something that is forbidden by the express condition imposed on the title of the land, meaning that the purpose is forbidden by law. It is forbidden by law because it is forbidden by s. 127 of the National Land Code. Section 127 of the National Land Code provides for the sanction for any breach of condition imposed on any alienated land. If there is any breach of condition, the land is liable to forfeiture; alternatively, the proprietor is liable to be fined by the Land Administrator. The provisions of s. 127 are as follows:

> **25. Liability to forfeiture for breach of condition**
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> (1) Upon any breach arising of any condition to which any alienated land is for the time being subject:
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> (a) the land shall become liable to forfeiture to the State Authority; and

A (b) except in a case where a fine is imposed under subsection (1A), or where action for the purpose of causing the breach to be remedied is first required to be taken under section 128, the Land Administrator shall proceed with the enforcement of the forfeiture in accordance with the provisions of section 129.

B (1A) (a) Upon any breach as is referred to in subsection (1) arising, the Land Administrator may, instead of taking action under section 128 or 129, serve a notice in Form 7E upon the proprietor, requiring him to show cause why a fine should not be imposed in respect of such breach.

C (b) Upon failure by the proprietor to show cause to the satisfaction of the Land Administrator, the Land Administrator may make an order for the payment of a fine of not less than five hundred ringgit, and in the case of a continuing breach, a further fine of not less than one hundred ringgit for each day during which the breach continues.

D (1B) Where a fine is paid upon an order made under paragraph (b) of subsection (1A), no action shall be taken under section 128 or 129 in respect of the breach.

E (1C) Notwithstanding subsection (1B), if the Land Administrator after due enquiry, is satisfied that the breach continues, he may serve a notice in Form 7F on the proprietor informing him of his intention to take action under section 128 or 129 upon the expiry of a period of six months from the date of service of the notice or at any time thereafter.

F (2) The acceptance on behalf of the State Authority of any item of land revenue due in respect of any alienated land shall not operate as a waiver of any right of forfeiture then existing in respect of the land by virtue of this section.

G (3) Land which has become liable to forfeiture under this section for breach of any condition shall cease to be so liable if:

(a) the breach is subsequently remedied, or

(b) in the case of a condition subject to fixed term, no action has been taken with respect to the breach under section 128 or 129 before the expiry of a period of twelve years beginning with the date on which the breach arose.

H (4) For the purposes of this section, and of sections 128 and 129, every breach of condition shall be taken to be capable of being remedied; and the action required for remedying any breach shall be taken to consist:

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(a) in the case of a positive condition of the doing of every act or thing the omission to do which constituted or formed part of the breach;

(b) in the case of a negative condition, of the doing of all such acts or things as are necessary to put the land into the state in which it would be if the breach had not occurred.

[17] By reason of s. 66 of the Contracts Act the defendant must refund to the plaintiff the RM9,000 that has been paid by the plaintiff to the defendant as a deposit under the tenancy agreement.

[18] In my judgment, it is no defence for the plaintiff to say that they were not aware of the condition endorsed on the land title. Being ignorant of the law is inexcusable. In any case, it was incumbent on the plaintiff to do a land office search before carrying out their commercial activities on the said land. If they had failed to do the search, then, it was recklessness on their part. This court will not condone such recklessness.

[19] In the present case, it is to be recalled that one of the plaintiff's causes of action against the defendant is that of misrepresentation in that the plaintiff alleges that the defendant, prior to the signing of the tenancy agreement, had told the plaintiff that there was no restriction on usage imposed on the title of the land. I hold that this allegation of misrepresentation is baseless. The plaintiff had the means of knowing about the condition imposed on the title of the land by means of a simple land search at the Land Office. In this regard, I refer to the Exception to s. 19 of the Contracts Act:

Voidability of agreements without free consent

19. (1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

(2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception – If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.